

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BRYAN KENT)	
Claimant)	
VS.)	
)	Docket No. 163,240
SCHMIDTLEIN ELECTRIC, INC.)	
Respondent)	
AND)	
)	
TRINITY UNIVERSAL INSURANCE)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant appeals from the Order Suspending Temporary Total Disability & Medical Compensation dated February 24, 1998, entered by Administrative Law Judge Floyd V. Palmer.

ISSUES

The issues as presented by claimant in his Application for Review by the Workers Compensation Appeals Board are stated as:

"A. The termination of the Temporary Total Disability & Medical of the Claimant is contrary to the evidence that has been presented and the record.

"B. The Court erred in finding that the Claimant refused medical treatment."

The respondent, in its brief, raised the issue of whether the Appeals Board has jurisdiction to review this preliminary order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for purposes of preliminary hearing, the Appeals Board finds as follows:

The Appeals Board must first determine whether it has jurisdiction to review this appeal from a preliminary hearing order. The order deals solely with the issues of medical treatment and temporary total disability compensation. K.S.A. 1997 Supp. 44-551(b)(2)(A) states in pertinent part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 1997 Supp. 44-534a(a)(2) clearly gives authority to the Administrative Law Judge to grant or deny a preliminary award of temporary total disability compensation and/or medical benefits. That statute further makes provision for the jurisdiction of the Appeals Board to review preliminary hearing orders:

A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

Respondent contends that the claimant failed to cooperate with recommended treatment by failing to schedule an appointment with Dr. Dick A. Geis when requested to do so by the authorized neurosurgeon, Dr. K. N. Arjunan. Then, after claimant was authorized to go instead to Dr. Jonson Huang, claimant failed to follow through with him as well. The Administrative Law Judge apparently agreed with respondent and issued his Order Suspending Temporary Total Disability and Medical Benefits.

In support of his order, the Administrative Law Judge cited K.S.A. 44-518 which provides:

If the employee refuses to submit to an examination upon request of the employer as provided for in K.S.A. 44-515 and amendments thereto or if the employee or the employee's health care provider unnecessarily obstructs or prevents such examination by the health care provider of the employer, the employee's right to payment of compensation shall be suspended until the employee submits to an examination and until such examination is completed. No compensation shall be payable under the workers compensation act during the period of suspension. If the employee refuses to submit to an examination while any proceedings are pending for the

purpose of determining the amount of compensation due, such proceedings shall be dismissed upon showing being made of the refusal of the employee to submit to an examination.

He also cites K.A.R. 51-9-5. It reads:

An unreasonable refusal of the employee to submit to medical or surgical treatment, where the danger to life would be small and the probabilities of a permanent cure great, will justify denial or termination of compensation beyond the period of time the injured worker would have been disabled had he or she submitted to an operation but only after a hearing as to the reasonableness of such refusal.

The penalty provided for the refusal to submit to an examination will be rigidly enforced. There shall be the utmost co-operation between the parties throughout to ascertain the true facts.

Claimant did not contend that the Administrative Law Judge exceeded his authority and jurisdiction. Rather, claimant argues the Administrative Law Judge erred in finding that claimant unreasonably refused to submit to medical treatment. Therefore, claimant is contending that the Administrative Law Judge's factual determinations concerning medical treatment are subject to review by the Appeals Board. We disagree.

The August 21, 1996 preliminary hearing was held pursuant to respondent's Form E-3, Application for Preliminary Hearing, seeking an order terminating temporary total disability compensation and medical treatment. Also, on February 7, 1996, respondent and the Fund filed a Motion to Terminate Temporary Total Disability and Medical. It did not allege failure to cooperate with medical treatment as the basis for terminating benefits. But, K.S.A. 44-518 was raised in a letter by respondent to the Administrative Law Judge dated April 24, 1996 and again orally at the preliminary hearing.

As shown, K.S.A. 44-518 provides alternative sanctions for a claimant's failure to submit to medical examination. Benefits can be suspended or, if the refusal occurs while proceedings are pending for the determination of compensation due, such proceedings can be dismissed. The Administrative Law Judge did not dismiss the proceedings. Instead, he ordered another examination of claimant be performed by the authorized treating physician.

Although not raised by claimant, another argument for the Appeals Board having jurisdiction to review the preliminary order is that under K.S.A. 1997 Supp. 44-534a(a)(2) claimant's alleged failure to cooperate with medical treatment constitutes a "certain defense." Our jurisdiction to review this order would thereby turn upon what is meant by "certain defense." Unfortunately, the statute provides little guidance. The Appeals Board does not find that there exists a category of defense to workers compensation claims

known as "certain defenses." Rather, the phrase "certain defenses" is analogous to some defenses as opposed to any defense or all defenses. The word "certain" as used in K.S.A. 1997 Supp. 44-534a is intended to limit the type and character of defenses which can be said to give rise to Appeals Board jurisdiction. For insight into the certain type of defenses contemplated by the statute, we must look to the other issues specified in K.S.A. 1997 Supp. 44-534a which, if disputed, are considered jurisdictional. They include: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; and (3) whether notice is given or claim timely made. What these jurisdictional issues have in common is that they all go to the compensability of the claim. In other words, for a workers compensation claim to be compensable each and every one of the issues listed, if disputed, must be proven by a claimant before he or she can recover any benefits under the Workers Compensation Act. The Appeals Board has previously held, and hereby reaffirms, the proposition that the certain kind of defenses contemplated by K.S.A. 1997 Supp. 44-534a(a)(2) are defenses which go to the compensability of the claim. Examples of these type of defenses would be an allegation of willful failure to use a guard or the intoxication defense.

The statute or defense relied upon by respondent could have resulted in a dismissal or could "justify denial or termination of compensation beyond the period of time the injured worker would have been disabled had he or she submitted to an operation [or treatment]." K.A.R. 51-9-5. Thus, the defense of an unreasonable refusal by an employee to submit to medical or surgical treatment, if successful, does not result in a finding that the claim is not compensable but rather can result in a cessation of benefits. Even with such a finding a claimant may still be entitled to benefits previously ordered or that predate the applicability of the defense. In addition, a respondent would not be entitled, for example, to reimbursement from the Workers Compensation Fund for medical or temporary total disability benefits previously provided under K.S.A. 1997 Supp. 44-534a(b) under circumstances where benefits are cut off pursuant to K.S.A. 44-518 and/or K.A.R. 51-9-5. Furthermore, a finding pursuant to K.S.A. 44-518 and K.A.R. 51-9-5 that an employee has unreasonably refused to submit to medical treatment such that compensation should be terminated is an interlocutory order which can be altered or rescinded based upon a change of circumstances or otherwise upon a rehearing of the matter. See Chippeaux v. Western Coal and Mining Co., 124 Kan. 475, 260 Pac. 625 (1927). As stated previously, such a finding does not go to the ultimate question of the compensability of the claim, but instead to the issue of claimant's entitlement to ongoing or future benefits. These examples all support a finding that, unlike the defenses alleging intoxication or a willful failure to use a guard, the provisions of K.S.A. 44-518 and K.A.R. 51-9-5 do not constitute a defense which should be considered jurisdictional and subject to review by the Appeals Board on an appeal from a preliminary order.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the appeal of claimant should be, and is hereby, dismissed and the order of Administrative Law Judge Floyd V. Palmer dated February 24, 1998 remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of May 1998.

BOARD MEMBER

c: Dan E. Turner, Topeka, KS
Robert L. Roberts, Topeka, KS
Bob W. Storey, Topeka, KS
Office of Administrative Law Judge, Topeka, KS
Philip S. Harness, Director